Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

LINDA GRAY,

Petitioner,

v.

GENLYTE THOMAS GROUP, LLC,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit, in conflict with every other federal circuit, incorrectly construes Federal Rule of Civil Procedure 51 to require that objections to jury instructions be stated distinctly *after* the jury charge, even where the objections have been stated distinctly and rejected prior to the charge.

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In conflict with the decisions of every other circuit, the First Circuit imposes an "ironclad rule . . . that failure to renew objections *after* the charge constitutes waiver of any claim of error." *Wilson v. Maritime Oveseas Corp.*, 150 F.3d 1, 6 (1st Cir. 1998) (citation omitted). Accordingly, the court of appeals deemed Petitioner's objections to the jury instructions waived, even though she had stated her objections and the reasons for them immediately prior to the judge's charge to the jury, the judge had expressly rejected the objections, and restating them after the charge would have been futile. This Court should grant review to resolve the conflict in the circuits on the question presented and to correct the First Circuit's erroneous construction of Federal Rule of Civil Procedure 51, a construction inconsistent with this Court's precedents. Indeed, the First Circuit's view is so plainly incorrect that summary reversal may be appropriate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 289 F.3d 128 (1st Cir. 2002), and is reproduced in the appendix at 1a. The order of the United States Court of Appeals for the First Circuit denying panel rehearing and rehearing en banc, along with Judge Gertner's concurrence in the denial of rehearing, is not reported and is reproduced in the appendix at 27a. The district court transcript reflecting the discussion of the proposed supplemental jury instructions and the instruction given appears in the appendix at 34a.

JURISDICTION

The order of the United States Court of Appeals for the First Circuit affirming the judgment in favor of Respondent was entered on April 18, 2002. Pet. App. 1a-2a. On May 1, 2002, Petitioner filed a timely petition for panel rehearing and/or

rehearing en banc, which was denied on June 17, 2002. *Id.* at 27a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 51 states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Factual Background

This case concerns the sexual harassment of a factory worker, petitioner Linda Gray, by a coworker at Respondent's Fall River manufacturing facility and Respondent's failure to address the harassment. Ms. Gray worked at the Fall River facility for seventeen years and was regarded as an excellent, productive worker. Trans. 3/9 at 5-7.

At the outset of Ms. Gray's employment in 1981, coworker Jose Hermenegildo expressed a sexual interest in her; and, when rebuffed, he began to sexually harass her. Shortly thereafter, her friend, male coworker Chris McIlroy, observed the offending conduct and saw to it that it was not repeated on his shift. *Id.* at 7-8; Trans. 3/15 at 3-4.

Years later, shortly after Mr. McIlroy transferred to another shift, Mr. Hermenegildo again began to harass Ms. Gray. The harassment included numerous sexual comments (such as "Do you like to kiss?") and gestures (such as grabbing his crotch and making sexual tongue gestures), as well as threats and intimidation (such as shaking her while asking why she was avoiding him, telling her that he knew where she lived, and following her when she drove home). Pet. App. 3a; Trans. 3/9 at 21, 26. Ms. Gray made clear that Mr. Hermenegildo's conduct was unwelcome and complained to Respondent at least once. When Respondent failed to take the action it had promised it would, Ms. Gray confronted Mr. Hermenegildo and demanded that he cease harassing her. For the next two years, the offending conduct recurred sporadically. Then in the summer of 1997, Mr. Hermenegildo began to stalk her daily and began again to make sexual gestures towards her. *Id.* at 21-30, 38-41, 54, 56, 57.

Thereafter, Ms. Gray repeatedly complained to Respondent about most, although not all, of the offending conduct that had occurred recently and in the past. *Id.* at 31-35, 37-38, 41, 69-72, 74, 83-84, 88-91; Pl. Exhs. 32, 35, 46. Not only did Respondent fail to take any meaningful disciplinary action against Mr. Hermenegildo, it allowed a videotape that showed an interaction in its parking lot between Mr. Hermenegildo and Ms. Gray to be destroyed and advised Ms. Gray to seek assistance from the local police with regard to

conduct occurring in Respondent's parking lot, rather than taking responsibility for that situation. Trans. 3/9 at 68-69, 71-72; Trans. 3/12 at 8-9. As a result of the harassment and Respondent's failure to protect her, Ms. Gray suffered an emotional breakdown that rendered her wholly disabled from working for six months, during which time she rarely felt secure enough to leave her home. Trans. 3/9 at 74-82; Trans. 3/15 at 13.

When Ms. Gray returned to work in early 1998, Mr. Hermenegildo initially harassed her only intermittently. The harassment escalated in September 1998 after she and coworker Ray Tisdale testified about Mr. Hermenegildo's behavior at a workers' compensation hearing held in connection with Ms. Gray's six-month disability. At that time, Mr. Hermenegildo made an offensive sexual gesture towards Ms. Gray and made an offensive sexual gesture and a threatening gesture towards Mr. Tisdale. Both Ms. Gray and Mr. Tisdale complained about the actions, but Respondent did not discipline Mr. Hermenegildo or take any action to protect Ms. Gray. Trans. 3/9 at 105; Trans. 3/12 at 18-19, 22-23. Shortly thereafter, Ms. Gray became totally disabled and has not worked since that date. Trans. 3/12 at 27-28, 34-35.

District Court Proceedings

Ms. Gray brought suit against Respondent in the United States District Court for the District of Massachusetts. Jurisdiction was based on 28 U.S.C. § 1332(a)(1). The complaint sought to impose liability under state law for sexual harassment and sexual discrimination.

At trial, the jury was instructed to answer several questions. The third question asked: "Was that conduct

sufficiently severe and/or pervasive so as to alter the conditions of plaintiff's employment by creating a work environment that a reasonable person would find intimidating, hostile, humiliating or sexually offensive?" Pet. App. 6a. The jury would only reach this question if it had first found that Ms. Gray was "subjected to sexual harassment" and that the conduct was "offensive and/or unwelcome." *Id.* at 5a. After seven hours of deliberation, the jury asked for clarification of the phrase "sufficiently severe." *Id.* The judge indicated that she would give a supplemental instruction in the morning and invited the parties to submit proposals for such an instruction.

The next morning, Ms. Gray submitted her proposed supplemental instructions in writing. The court discussed the supplemental instructions with counsel; and the court read to counsel the supplemental instruction it intended to give, and ultimately gave, to the jury. *Id.* at 46a. Ms. Gray's counsel objected that it contained a misstatement of the law, discussed his objection and the grounds for it in considerable detail, and requested a different instruction. Although Respondent's counsel himself stated that Ms. Gray's counsel was correct, the district court refused to alter its instruction, stating that it believed counsel's request to be misleading and incorrect. In addition, Ms. Gray's counsel reiterated some of his other written requests for supplemental instructions, noting that the court's proposed instruction failed to address critical issues. The district court rejected those requests as well. When counsel raised one of his points a second time, the court responded: "I really am trying to do it in such a way that the jury can find some assistance from this additional instruction, not to satisfy the court of appeals or counsel, for that matter." *Id.* at 50a.

Moments later, the court gave the jury the supplemental instruction, which was almost identical to the instruction

discussed in detail with counsel just prior to the charge. *Compare id.* at 46a, *with id.* at 52a-53a. The court then asked whether there were objections. Gray's counsel responded: "Just simply the ones I have already stated, your Honor." *Id.* at 53a. The objections "already stated" were those detailed in writing that morning and/or discussed orally only minutes earlier. Likely for that reason, the court immediately, and without affording Ms. Gray's counsel a sidebar conference as required by Federal Rule of Civil Procedure 51, turned to the jury and stated, "In that case, I now charge you to continue your deliberations." The jury left the courtroom at 9:29 a.m., and returned later that day with a verdict for Respondent. *Id.* at 53a.

Proceedings on Appeal

On appeal, five of Ms. Gray's eight claims of error concerned the jury instructions. Typically, a claim of error related to a failure to give instructions is reviewed de novo, and a claim of error related to the court's choice of language is reviewed for abuse of discretion. *Id.* at 8a (citing *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 & n.7 (1st Cir. 1998)). However, because Ms. Gray's counsel had only referenced but not restated his objections after the judge read the supplemental charge to the jury, the panel held that Ms. Gray had not properly preserved her objections, and thus reviewed the five claims only for plain error. Pet. App. 8a-9a. This standard of review is far less beneficial to the appellant, as it "permits reversal only when the court is *certain* that substantial rights were affected," that is, when the court is certain that the error "*must* have affected the outcome of the district court proceedings." *Wilson*, 150 F.3d at 6 (citation omitted) (emphasis added).

The panel agreed that several instructions were problematic and that most of the objections were "respectable." Pet. App. 12a. It stated that one instruction "could—if taken in isolation—easily have misled the jury," *id.* at 13a, and that another instruction was not what "in the future the jury should be told." *Id.* at 12a. The court also agreed with Ms. Gray that a statement of law that defense counsel had made to the jury in her closing statement, for which the court refused to give a requested curative instruction, "was inaccurate" and "went too far." *Id.* at 17a, 18a. Nonetheless, the panel found no plain error in the instructions. Although it found the jury's verdict "surprising," given that Ms. Gray "was manifestly mistreated by Hermenegildo on the job and suffered badly as a result," *id.* at 23a, the panel therefore affirmed.

Ms. Gray petitioned for rehearing en banc or, in the alternative, for panel rehearing. Insofar as it sought en banc review, her petition focused on the fact that the First Circuit's construction of Rule 51 is in conflict with that of every other federal court of appeals. In those circuits, an objection is deemed preserved where the trial court had actual notice of the nature and grounds of the objection. In seeking panel rehearing, Ms. Gray's petition asked, among other things, that if the First Circuit's construction of Rule 51 was not in conflict with that of the other circuits, the case be reheard to apply that construction.

The court denied both rehearing and rehearing en banc. District Court Judge Gertner, who sat on the panel by designation, concurred in the denial of rehearing but wrote a separate opinion to explain her "reluctan[ce]" in doing so. *Id.* 28a, 29a. Judge Gertner observed that the Second through Eleventh and the District of Columbia Circuits "recognize that objections do not have to be restated where, as here, restating

such objections after the charge would be a mere formality." *Id.* at 29a. Only the First Circuit does not. *Id.* at 30a. Judge Gertner also noted that the petition for *panel* rehearing asked the court to read into First Circuit precedent an exception to its generally "ironclad" construction of Rule 51 that would be consistent with the law in other circuits, but she reiterated that the First Circuit's rule is in fact different: "Whereas other courts will always look to the context to determine if the trial court was in fact aware of the grounds for the objections, and determine whether restatement was necessary, this court requires that specific words be spoken after the charge." *Id.* at 29a, 32a.

Finally, the concurrence pointed out that the First Circuit's reading of Rule 51 did not serve the purpose of the rule, and yet was dispositive in this case:

> Rule 51 was intended to redress a very practical problem: giving the judge information quickly and concisely, before the jury retires to deliberate, so that she can correct any errors in the charge. It should be enforced with a view to the same practicalities. In this case, counsel's omission—especially given his zealous efforts just before the charge, addressed to the judge's proposed instructions—should not raise the bar for the consideration of substantial appellate issues.

Id. at 33a.

REASONS FOR GRANTING THE WRIT

A. The First Circuits's Reading Of Federal Rule 51 Conflicts With That Of The Other Circuit Courts.

This petition should be granted to resolve the split in the circuits over the construction of Federal Rule of Civil Procedure 51. In contrast to *every* other circuit, the First Circuit construes Rule 51 to require that objections be made not only "before the jury retires," as the plain language of Rule 51 states, but also after the judge charges the jury, even where objections have been made to a proposed charge that is virtually the same as the charge read. *E.g.*, Pet. App. 7a-8a; *Smith v. MIT*, 877 F.2d 1106, 1109 (1st Cir. 1989) (citing cases). The post-charge objection may not refer back generally to an objection made in detail prior to the charge, but must restate distinctly the objection and grounds therefor. *E.g.*, *Davis v. Rennie*, 264 F.3d 86, 100 (1st Cir. 2001); *Elliott v. S. D. Warren Co.*, 134 F.3d 1, 6 (1st Cir. 1998). The Circuit has reiterated this strict, formalistic requirement time and again over the past fifty years. *See, e.g.*, *United States v. Nason*, 9 F.3d 155, 160-61 (1st Cir.1993); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir. 1988) (listing representative First Circuit cases going back to 1955); *cf. United States v. Arthurs*, 73 F.3d 444, 448 (1st 1996) (applying same rigid interpretation to Fed. R. Crim. P. 30).

In every circuit other than the First Circuit, compliance with Rule 51 does not require that the objections be restated after the charge has been read to the jury. Those circuits hold that objections need not be stated after the charge is given where restating objections after a jury charge would be a mere formality and unavailing. *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997); *Smith v. Borough of*

Wilkinsburg, 147 F.3d 272, 277 (3d Cir. 1998); *Eberhardt v. Integrated Design & Construction, Inc.*, 167 F.3d 861, 866 n.1 (4th Cir. 1999); *City of Richmond v. Madison Management Group*, 918 F.2d 438, 453 (4th Cir. 1990); *Russell v. Plano Bank & Trust*, 130 F.3d 715, 720 (5th Cir. 1997); *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 547 (6th Cir. 1995); *Lawson v. Trowbridge*, 153 F.3d 368, 372 (7th Cir. 1998), *Brown v. Sandals Resorts Int'l*, 284 F.3d 949, 953 n.6 (8th Cir. 2002); *Gulliford v. Pierce County*, 136 F.3d 1345, 1348 (9th Cir. 1998); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262 n.5 (10th Cir. 1998); *Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999); *Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 693 (D.C. Cir. 1987).[1]

Although the First Circuit has permitted exceptions to its rule on a few occasions, *see Wilson*, 150 F.3d at 7; *Harrington v. United States*, 504 F.2d 1306, 1316-17 (1st Cir. 1974), those exceptions do not bring the court into line with the other circuits, as is apparent from the opinion below and

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[1] Ms. Gray's objections easily satisfy the standard applied in the other circuit courts of appeal. As in the cases cited above, "[b]ecause [Ms. Gray] argued [her] position to the district judge, who rejected it, a further exception after delivery of the charge would have been a mere formality, with no reasonable likelihood of convincing the court to change its mind on the issue." *Thornley*, 104 F.3d at 30. The transcript shows that the court was well-apprised of the specific objections and grounds therefor when, after the judge gave the supplemental charge, counsel stated that Ms. Gray's objections were "[j]ust simply the ones I have already stated, your Honor." Pet. App. 53a.

addressed expressly in Judge Gertner's concurrence. Indeed, in contrast to this Court's approach, *see infra* pages 11-12, the First Circuit's "ironclad" rule deems objections waived even where the district court has assured counsel that prior objections need not be repeated after the jury charge. *See Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205, 1212-13 (1st Cir. 1995), and cases cited therein.

The petition should be granted to resolve the split in the circuit courts' interpretations of Rule 51.

B. The First Circuit's Reading Of Rule 51 Is Inconsistent With This Court's Precedent And With The Text And Purpose Of Rule 51.

The petition should also be granted because the First Circuit's rule is inconsistent with both this Court's precedents and the text and purpose of Rule 51. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, Inc.*, 370 U.S. 19, 27 (1962), the Court held that objections were preserved where, although the petitioners acquiesced in additional instructions after the general jury charge, counsel had objected to the instructions and requested other instructions prior to the charge, the court had consistently ruled adversely to counsel on the point at issue, and after the court delivered the charge it told counsel that prior objections would be preserved. Similarly, in *Jones v. United States*, 527 U.S. 373 (1999)—a case concerning Federal Rule of Criminal Procedure 30, which, like Rule 51, provides that "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection"—the Court reiterated that an objection made in a motion for a directed verdict before the jury retires is preserved for appeal,

whether or not the objection is made in connection with, or stated again after, the jury charge. *Id.* at 388 (citing *Leary v. United States*, 395 U.S. 6, 32 (1969)).

The Court took a similar approach in *Osborne v. Ohio*, 495 U.S. 103 (1990). There, the petitioner pressed one particular legal objection in a motion to dismiss, made just before the start of a brief trial; the court denied the motion, and Osborne did not object to the jury instruction on the same point. Reading a state procedural rule regarding objections to jury instructions in the same way that the First Circuit reads Rule 51, the Ohio Supreme Court refused to reach Osborne's contention on the ground that the objection to the jury instruction had been waived. This Court, however, refused to allow the procedural rule to bar consideration of Osborne's objection. As the Court explained: "nothing would be gained by requiring [Petitioner's] lawyer to object a second time . . . . The trial judge, in no uncertain terms, rejected counsel's argument . . . ." *Id.* at 124.

In contrast to this Court's practical, contextual approach to considering whether objections have been preserved, the First Circuit's absolutist reading of Rule 51 "force[s] resort to an arid ritual of meaningless form." *Id.* (citation omitted). "The purpose of the rule is to enable the trial court to correct any error it may have made before the jury begins its deliberations and thus avoid the necessity of a new trial." *Lang v. Texas & P. Ry.*, 624 F.2d 1275, 1279 (5th Cir.1980); *Meitz v. Garrison*, 413 F.2d 895, 899 (8th Cir. 1969) (purpose of rule is served "as long as it is clear that the trial judge understood the party's position") (quoting 5 Moore's Federal Practice § 51.04 (2d ed. 1968)). As recognized in the concurrence below, Pet. App. 33a, requiring counsel to repeat after the jury charge objections that counsel has already stated distinctly does not further this purpose. It is a "pointless formality." *Gulliford*, 136 F.3d at 1348; *see United*

States v. Davis, 583 F.2d 190, 195 (5th Cir. 1978) ("blindly" applying procedure for objections transforms rule "from a sound principle of judicial administration into a trap for the unwary, a trap reminiscent of the senseless technicalities that characterized common law procedural systems") (discussing Fed. R. Crim. P. 30 and quoting *United States v. Currens*, 290 F.2d 751, 759 (3d Cir. 1961)).

On its face, Rule 51 requires only that objections be stated "before the jury retires," and does not specify whether the objections are to be made before or after the jury receives the charge. In an individual case, requiring that objections be made after the judge charges the jury may be necessary because counsel will not know precisely what instructions the judge is going to state until the judge charges the jury. Although a party may present arguments about various proposed instructions before the charge is read, the judge's ultimate charge will often reflect a compromise among the various proposals, and the judge is entitled to be told why, in the context of the entire charge, the rejection of certain discrete proposals remains inappropriate. However, where, as here, the judge has reviewed the proposed charge with counsel, received and overruled counsel's objections, and given the jury the same charge that was discussed, following which counsel has made clear that he stands by the objections discussed just moments before, *see* Pet. App. 35a-53a, nothing is gained from requiring counsel to repeat the specific objections already made distinctly and in detail. Indeed, such a requirement is inconsistent with the easing of formality embodied in Federal Rule of Civil Procedure 46, which abolished the requirement of formal "exceptions" to judicial rulings and requires only that a party make its objections and the reasons for them clear to the trial court. As many courts have recognized, Rule 51 should be read together with Rule 46 to bar imposition of a strict, formal rule

such as the one imposed by the First Circuit below.[2] *See* 9A C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d* § 2553 (1995) (citing cases).

The First Circuit's "ironclad" requirement ascribes to the drafters of Rule 51 an intent to adopt the same "arid ritual of meaningless form" rejected by this Court in *Osborne*. Accordingly, the Court should grant the petition to correct the First Circuit's erroneous construction of Rule 51.

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[2] Rule 46 provides:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should summarily reverse the decision below or set the case for briefing and argument.

Respectfully submitted,

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August 2002

United States Court of Appeals
For the First Circuit

No. 01-1915

LINDA GRAY,
Plaintiff, Appellant,

v.

GENLYTE GROUP, INC.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

Before
Boudin, Chief Judge,
Lynch, Circuit Judge,
and Gertner,[1] U.S. District Judge.

Mark D. Stern with whom Mark D. Stern, P.C. was on brief for appellant.

Brian H. Lamkin with whom Timothy P. Van Dyck, Edwards & Angell, LLP, Dorothy Pitt and Pitt, Fenton & Smith were on brief for appellee.

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[1]Of the District of Massachusetts, sitting by designation.

April 18, 2002

BOUDIN, Chief Judge. This appeal stems from Linda Gray's suit in the district court charging Genlyte Group with liability under Massachusetts law for sexual harassment. The jury returned a special verdict for Genlyte, finding that Gray had been subject to sexual harassment by a Genlyte employee but not through conduct sufficiently severe or pervasive to warrant liability. Gray now appeals, claiming errors in the instructions to the jury and in rulings on admissibility of evidence.

We begin with a brief synopsis of the evidence on both sides. In assessing sufficiency-of-the-evidence claims, we normally only consider the evidence in the light most favorable to the verdict. Rodowicz v. Mass. Mut. Life Ins. Co., 279 F.3d 36, 39 (1st Cir. 2002). However, for most other kinds of questions (e.g., admissibility, the appropriateness of jury instructions, plain or harmless error), evidence offered by either side or both may be pertinent. See id.

Gray worked from 1980 to 1998 at Genlyte's Lightolier plant in Fall River, Massachusetts. In her subsequent trial, she claimed that she was harassed in 1981 by Jose Hermenegildo, another Genlyte employee, for a few weeks. In particular, Hermenegildo allegedly stared at Gray and made tongue gestures mimicking oral sex. Gray did not report this conduct to Genlyte. It ceased when her boyfriend—a co-worker at the factory—threatened Hermenegildo.

Fourteen years later, in 1995, the harassment resumed after her boyfriend moved to a different shift. According to Gray, Hermenegildo's harassment included statements (e.g., "Do you like to kiss?"); gestures (grabbing his crotch, sexual tongue gestures); and contact (touching her hair and—on one occasion—grabbing and shaking her while asking why she was avoiding him). Gray testified that in other instances Hermenegildo's conduct appeared threatening. He watched her in the parking lot before and after work, approached her at work, stared at her, and once followed her and her children home in his car.

At trial, Gray claimed that she had reported some or all of the harassment to her supervisor, Joe Pavao, and his supervisor, Bill Torrence, and nothing had been done. However, Torrence said that she had told him only that Hermenegildo was watching her and invited Torrence to observe him on a specific occasion; further, he said she later told him that she had taken care of the problem herself.

According to Gray, Hermenegildo's misbehavior diminished in 1996, but she began to fear him after learning in that year that he had beaten his wife. In 1997, Hermenegildo's earlier alleged misconduct resumed and in August 1997, Gray reported it to her supervisor and also provided a laundry list of his conduct in 1981 and 1995.

Gray testified that following her detailed complaint in August 1997, her supervisors took no significant action to investigate her claims or discipline Hermenegildo. Shortly after the meeting, Gray suffered a severe panic attack and was treated for continuing emotional distress. She did not return to work for the rest of 1997 but retained a lawyer who wrote to the company. The company took no action. Gray then filed a

charge with the Massachusetts Commission Against Discrimination ("MCAD"). Mass. Gen. Laws (M.G.L.) ch. 151B § 5 (2000).

When Gray returned to work in January 1998, she said that Hermenegildo howled at her and followed her in the parking lot. In August 1998, Gray and other workers testified about Hermenegildo's misbehavior at a workers' compensation proceeding brought by Gray. In September 1998, Hermenegildo allegedly made an offensive tongue gesture at Gray and threatening gestures against another employee (Ray Tisdale) who testified at the August 1998 hearing.

Gray testified that due to emotional distress, she had been unable to work at the plant or elsewhere from September 1998 onward. In March 1999, she filed a criminal charge against Hermenegildo based on his September 1998 tongue gesture and, in April 2000, he was convicted of a misdemeanor for, "with offensive and disorderly acts or language[,] accost[ing] or annoy[ing]" Gray at her workplace. M.G.L. ch. 272 § 53 (2000). In October 1999, she brought this diversity action against Genlyte charging it with violation of M.G.L. ch. 151B, which inter alia forbids an employer from tolerating sexual harassment in the workplace.

Genlyte's evidence at the subsequent trial did not directly refute Gray's claims as to individual incidents—the company did not call Hermenegildo to testify—but it did raise doubts about Gray's claims on several fronts. On cross examination, Gray acknowledged that she had not reported the 1981 incidents to the company that year and she gave conflicting accounts of whether she had ever reported some of the most serious subsequent conduct (e.g., Hermenegildo grabbing his crotch and making lewd remarks). And Torrence

testified that Gray's 1995 complaint was far more limited in scope than she had claimed.

Genlyte also adduced testimony from Gray's own witnesses—a treating social worker and a psychiatrist who testified as an expert for Gray. Based on their testimony, Genlyte asserted that Gray had suffered from emotional, psychological and social difficulties from her childhood onward, that she had personality disorders, and that her reactions to her treatment by Hermenegildo were more extreme than they would otherwise have been.

Finally, Genlyte argued that most of Gray's charges against Hermenegildo were uncorroborated by evidence from others at the plant. Based on its own witness' testimony, the company said that its supervisors had made reasonable and good faith efforts to investigate such complaints as Gray had made to it, handicapped though they were by her delays and omissions. On this basis, it argued that even if the harassment alleged had all occurred, the company lacked sufficient notice to make it liable.

For its deliberations, the jury was given a verdict form with six special questions, of which only the first three were eventually answered. The first three read as follows:

> (1) Was plaintiff, Linda Gray, subjected to sexual harassment, i.e. verbal or physical conduct of a sexual nature?
>
> (2) Was that conduct offensive and/or unwelcome to plaintiff?

> (3) Was that conduct sufficiently severe and/or pervasive so as to alter the conditions of plaintiff's employment by creating a work environment that a reasonable person would find intimidating, hostile, humiliating or sexually offensive?

After seven hours of deliberation, the jury submitted the following question:

> We're not going to reach a verdict tonight, as we are 'hung up' on Question 3. I would not characterize us as deadlocked, but we do need some more time to deliberate. The wording of Question 3 has us a bit concerned. 'Sufficiently severe' is fairly nebulous, and we are wondering if we could have some clarification. Thank you very much.

Both sides then submitted suggestions for supplemental jury instructions and the district court met with counsel to discuss them.

After hearing objections by Gray's counsel who had proposed numerous supplemental instructions, the district court delivered a single supplemental instruction, telling the jury that as to question (3) it should consider the "totality" of the circumstances over the period in question (including the frequency, severity, and/or offensiveness of the conduct), whether it was physically threatening, whether it would reasonably interfere with a reasonable woman's job performance, and whether it would undermine her ability to succeed at her job.

After further deliberation, the jury returned a verdict in Genlyte's favor. It answered "yes" to questions (1) and (2) but "no" to question (3). Based on the verdict form, a "no" answer to question (3) ended the case in defendant's favor and spared the jury from having to consider the company's knowledge of the harassment, the adequacy of steps taken to prevent it and the amount of damages to be awarded. This appeal followed.

On appeal, five of the eight claims of error advanced by Gray concern the failure to give instructions or errors in the instructions that were given. Such claims are reviewed de novo (e.g., failure to give an instruction) or under an abuse of discretion standard (e.g., court's choice of language). Wilson v. Mar. Overseas Corp., 150 F.3d 1, 10 & n.7 (1st Cir. 1998). However, casting a shadow over Gray's claims is Genlyte's contention that none of the objections to the instructions was adequately preserved, so they are reviewable only for plain error. We agree with Genlyte.

Insofar as the initial instructions are concerned, none of the errors or omissions now objected to was specifically identified by Gray's counsel after the instructions and before the jury first retired, even though the district judge warned that specific objections would be necessary to preserve the objections; the only debatable case is discussed below. As for the requested supplemental instructions, the district court after giving its supplemental instruction asked for objections. Gray's counsel responded, "Just simply the ones I have already stated, your Honor." This is not enough.

The governing rule provides that a party cannot assign as error the giving of or failure to give an instruction "unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds

of the objection." Fed. R. Civ. P. 51 (emphasis added). "Objection" means to the instruction as given; thus, even if the initial request is made in detail, the party who seeks but did not get the instruction must object again after the instructions are given but before the jury retires for deliberations. Smith v. Mass. Inst. Tech., 877 F.2d 1106, 1109 (1st Cir. 1989). Further, it is not enough for counsel in renewing an objection merely to refer back generically to objections made before the charge.[2]

This may seem harsh, but it accords with the language of Rule 51, which requires that the objection state "distinctly the matter objected to and the grounds of the objection," Fed. R. Civ. P. 51, and we are in any event bound by a long line of precedents. See note 1, above. Further, in many instances, the judge will not know just what it is in the instructions as given that has not satisfied counsel. It is easier to have a flat rule than try to decide case by case when the judge should have been warned more "distinctly" as to the concern, although there will always remain some gray-area cases posing hard questions. See Wilson, 150 F.3d at 7-8.

Despite the unqualified language of Rule 51, this court has allowed appellate review for "plain error" despite the lack of a proper objection, but plain error is "confined to the

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[2]See Davis v. Rennie, 264 F.3d 86, 100 (1st Cir. 2001); Elliot v. S.D. Warren Co., 134 F.3d 1, 5-6 (1st Cir. 1998); see also 9A Wright and Miller, Federal Practice and Procedure § 2553 at 411-415 (1995) (noting that although some courts will forgive a failure to object after the instruction if the party's position previously had been made clear to the trial judge, this is "risky business" and counsel should renew all objections at the close of the jury charge to properly preserve them).

exceptional case." Toscano v. Chandris, S.A., 934 F.2d 383, 385 (1st Cir. 1991) (internal quotations omitted). We have followed the Supreme Court's general formulation, first used in criminal cases, requiring the party claiming plain error to demonstrate (1) that there was error, (2) that it was plain, (3) that it likely altered the outcome, and (4) that it was sufficiently fundamental to threaten the fairness or integrity or public reputation of the judicial proceeding. United States v. Olano, 507 U.S. 725, 735-36 (1993).

Of the five omitted instructions, only two come close to being error and neither is "plain" error. The most difficult one concerns the relationship between sexual harassment and intimidation. In a nutshell, Gray argues that the district court effectively told the jury that it could not consider non-sexual conduct but only conduct that was either explicitly sexual or had "sexual overtones" and that this altered the outcome of the case by excluding merely threatening conduct (e.g., following Gray home).

Section 151B, like Title VII, see 42 U.S.C. § 2000e-2 (1994), prohibits discrimination based on "sex" regardless of whether it is manifested by conduct that is sexual in character or is wholly non-sexual but is motivated by gender. See e.g., Brockton v. MCAD, 386 N.E.2d 1240, 1241 (Mass. 1979) (denial of accrued sick leave benefits for pregnancy-related disabilities); Thurber v. Jack Reilly's, Inc., 521 F. Supp. 238, 240-41 (D. Mass. 1981), aff'd, 717 F.2d 633 (1983), cert. denied, 466 U.S. 904 (1984) (failure to promote employee because of her sex). Thus Gray could have charged Genlyte, among other faults, with tolerating intimidation motivated by gender. But that is not what happened.

The Massachusetts statute, unlike the federal statute, provides explicitly that "[d]iscrimination on the basis of sex shall include, but not be limited to, sexual harassment" and in the same provision states that the term "sexual harassment" shall mean:

> sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.

M.G.L. ch. 151B § 1(18).

Gray's complaint did cite section 151B's discrimination provision at the outset but the rest of the complaint phrased the claim, and did so repeatedly, in terms of "sexual harassment." In other words, Gray narrowed her claim to "sexual harassment" as defined by Massachusetts law. The Massachusetts definition addresses itself to "sexual" advances and requests and to verbal or physical conduct "of a sexual nature." Accordingly there is a literal-language basis for instructing the jury that, in cases where the charge is sexual harassment, all of the conduct used to prove sexual harassment must have some connection to sex.

Still, acts of intimidation could comprise part of a pattern of sexual harassment, even though standing alone such

acts might have no sexual connotation. Consider a male employee who made a series of explicit sexual advances to a female co-worker and then, when rebuffed, lurked outside the victim's home. Massachusetts precedent appears to support this common-sense view, see Dahms v. Cognex Corp., 2000 WL 33170952, 12 Mass. L. Rptr. 486 (Mass. Super. 2000) ("Conduct which is not specifically sexual in nature may nevertheless be evidence of . . . hostile work environment sexual harassment.").

In its original instructions to the jury, the district court came close to tracking the statute—and then went a bit beyond in Gray's favor:

> [Sexual harassment] is any conduct of a sexual nature, and it is actionable if it's sufficiently pervasive in the place where it takes place or in the context of wherever it does take place. It can consist of sexual remarks, of ridicule, of intimidation, but it has to have sexual overtones.

In explaining just how severe the harassment had to be in order to create a hostile work environment, the district court used somewhat similar language, "[D]ecide whether the totality of [Hermenegildo's] conduct was so severe, so pervasive that a reasonable woman would find the work environment to be hostile, humiliating, or intimidating as a result of that conduct."

In this case, some of Hermenegildo's conduct was overtly sexual (remarks, the tongue gestures, crotch grabbing) while other acts (in our view) were implicitly so in the context of the explicit conduct: staring at Gray, waiting for her in the parking lot, appearing at her work station, following her home. The jury may well have taken the district court's reference to

"intimidation . . . [having] sexual overtones" to encompass this latter conduct; but perhaps it thought that conduct could count only if in isolation it had "sexual overtones." No one can be sure.

As to the proper reading of Massachusetts law, our own view is that the SJC would construe the statute in accordance with Dahms so we think that in the future the jury should be told (where pertinent) that acts of intimidation may be part of "sexual harassment" based on context alone. Still, it is impossible to describe the district court's own "overtones" charge as plain error since it tracks (or is more favorable than) the statute taken literally and there is little direct Massachusetts precedent. And, since the jury may well have understood the instruction given to encompass all of Hermenegildo's reprehensible conduct, it is even harder to say that the ambiguity likely altered the result. Olano, 507 U.S. at 734.

Gray's brief makes four other objections to the instructions which are also respectable but in our view less powerful. We start with the one on which Gray places greatest stress. Gray says that she asked that the supplemental instruction tell the jury to consider the plight of a reasonable woman "in Gray's position," that the district court failed to include the quoted language, and that consequently the supplemental instruction misled the jury into believing that it should consider the experience of women at the plant as a whole rather than Gray's own experience.

The problem arises primarily because the supplemental instruction (which we reprint in full in an attachment) told the jury inter alia that the severity issue "boils down to this":

> Would the mythical reasonable woman that we talked about yesterday, that I described to you yesterday, neither overly sensitive nor overly hardened, would that mythical reasonable woman find the work environment at Lightolier, as it has been described to you in the course of the trial, hostile, humiliating, or intimidating as a result of the sexual harassment that you found had occurred? [emphasis added].

This, coupled with the absence of language focusing the jury on Gray's own experience, could—if taken in isolation—easily have misled the jury into thinking that the severity issue turned on the experience of the average woman in the plant. In fact, there was a limited amount of evidence at trial about the experience of other women.

Nevertheless, we think it highly unlikely that, in the context of the trial as a whole, the jury misunderstood. First, the great bulk of harassment evidence at trial concerned harassment of Gray. Second, in a pre-charge instruction on the third day of trial, the district court told the jury that the key question as to severity was whether the harassment was "hostile or intimidating or humiliating to an objectively reasonable person in the plaintiff's position"—the very words Gray says were required. Third, the closing arguments of opposing counsel both focused on the harassment of Gray—not the experience of other women. Finally, the three special questions answered by the jury, reprinted above, focused directly on the harassment to which "Linda Gray" had been subject.[3]

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[3]The first question asked: "Was plaintiff, Linda Gray, subject to sexual harassment, i.e., verbal or physical conduct of

In sum, the supplemental instruction might well be error if taken alone; but in the context of the trial it is doubtful that the jury was misled. In all events, we are confident that the instruction in context does not meet a critical requirement for plain error, namely, that its correction would likely have altered the result. We add that the very ease with which any confusion could have been resolved, and the certainty that the district court failed to appreciate the inference created by the abstract wording of the instruction, underscores the need for counsel to make a distinct objection after the instructions.

Next, Gray argues that Massachusetts case law makes clear that sexual harassment can be based not only on the impact of individual acts taken separately but also on the "cumulative effect" of such acts over a period of time. E.g., Cuddyer v. Stop & Shop Supermarket Co., 750 N.E.2d 928, 937 (Mass. 2001). In both the original charge and the supplemental charge, the district court asked the jury to consider "the totality of the circumstances over the period of time in question" including its frequency, severity and offensiveness.

We will assume that "totality" might in some situations have a different and less favorable nuance for a plaintiff than "cumulative", although this might be debated and vary from case to case. But while Gray did request the word "accumulated" in her original instruction request and "cumulative" in her supplemental request, in neither case did she specifically call the court's attention to the discrepancy after

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a sexual nature?" Questions (2) and (3) inquired whether "that conduct" was offensive or unwelcome to plaintiff and whether "that conduct" was sufficiently severe or pervasive to violate the standard described by the court.

the charge, which is a perfect illustration of why Rule 51 demands specificity. If there was error, it was neither plain nor prejudicial under Olano.

Next, when the jury returned after its initial deliberation and asked the court to give it further guidance, Gray's counsel asked for an instruction telling the jury that "[c]onduct is sufficiently severe and pervasive if it" met any one of the following rubrics; there then followed a list of eight characterizations, each (with one exception) matched by a citation to a Massachusetts case or MCAD ruling. Two examples suffice: "If it would alter a reasonable woman's work environment" and "If it went beyond the boundaries of typical workplace horseplay."

The district court declined to give this instruction. Instead, the trial judge told the jury to consider whether the reasonable woman would "find the work environment hostile, intimidating or humiliating, as a result of the sexual harassment conduct that had occurred"; and the court then continued, mentioning two of the eight factors that Gray's supplemental instructions had mentioned and describing them as matters to consider rather than as independent bases for liability:

> Now, in making that judgment, consider the totality of the circumstances over the period of time in question, that is, 95, '7 and '8, including the frequency of the conduct, its severity and/or offensiveness, whether it is physically threatening, whether it would unreasonably interfere with a reasonable woman's job performance or whether it would undermine her ability to succeed at her job.

The district court in explaining its refusal to give the supplemental instruction in the form sought by Gray said that the list of slightly different formulations would be more confusing than helpful; and on appeal Genlyte accuses Gray of "nit picking" in pursuing its objection. We do not agree that Gray's request is a minor quibble: instead, we think the requested instruction was flatly wrong and would reject this claim of error even if it had been properly preserved by a post-instruction specific objection, which it was not.

The idea of extracting from state-law cases or MCAD decisions a string of individual sentences and elevating them to independent bases for liability has an obvious potential for mischief. Certainly, the full complement of conduct alleged in this case obviously "would alter a reasonable woman's work environment" (or so a jury might find) but that would be true also of much milder misconduct that would not be sufficiently severe and pervasive. Similarly, misconduct could go "beyond the boundaries of typical workplace horseplay" but not amount to sexual harassment.

The real vice of the requested instruction is that it takes out of the context of surrounding facts and legal discussion phrases that were almost certainly not intended as free-standing tests of liability. Admittedly, a couple of the other examples in Gray's laundry list come closer to stating defensible tests, but the district court was not required to pare down a laundry list to the least objectionable quotations. See Febres v. Challenger Caribbean Corp., 214 F.3d 57, 63-64 (1st Cir. 2000). And, of course, even if the list were pristine, the district judge would have been under no obligation to use those particular words. United States v. Destefano, 59 F.3d 1, 2-3 (1st Cir. 1995).

Finally, so far as instructions are concerned, Gray complains that the district court failed to correct a misstatement of law by Genlyte's counsel made in closing argument. Genlyte's counsel said the following in the course of closing argument:

> [T]he biggest hurdle she's got to get over is convincing you that a reasonable woman working out in that Lightolier plant at the time would have felt that the conduct that she told us about was sufficient—was sufficiently severe and pervasive as to create a sexual hostile working environment.

Obviously, the phrase "that she told us about" ("us" meaning Genlyte) was inaccurate. If Genlyte had not known and had no reason to know that one non-supervisory employee was harassing another, it would not be responsible, cf. College-Town Div. of Interco, Inc. v. MCAD, 508 N.E.2d 587, 591-93 (Mass. 1987); Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986).[4] However, at trial Gray was not limited to proving only episodes about which she had specifically complained to her

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[4]Under section 151B an employer is, however, liable for harassing conduct by its supervisors even if that conduct was not reported. College-Town, 508 N.E.2d at 592-94; see also Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998)(under Title VII an employer is vicariously liable for discriminating conduct by a supervisor subject to an affirmative defense).

employer.[5] Of course, Genlyte was entitled to argue, as it did, that the failure to report episodes cast doubt on Gray's credibility, but the quoted statement of defense counsel went too far, as Genlyte's brief more or less concedes.

The problem is that Gray's counsel did not complain about the statement after the closing arguments or in connection with the initial instructions. Instead, after the instructions were given, Gray's counsel listed various specific objections and then ended by saying: "There was a misstatement of the law by the opposing counsel." The district judge said that she thought she had been even-handed and then went on to another topic. Gray's counsel could have but failed to identify the misstatement, and the district judge probably never knew what counsel was complaining about.

When the jury came back requesting further instructions on the severity issue, Gray's counsel for the first time did ask the court to instruct the jury that it should consider not only the actions for which Gray had made a timely and adequate complaint but "all actions she suffered." Before the supplemental instruction was given, Gray's counsel sought to

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[5]Once Genlyte was on notice and failed to act, it could easily become responsible for later harassment not specifically reported to it. See College-Town, 508 N.E.2d at 593. And in some situations pre-notice harassment might be relevant to the severity/pervasiveness issue even though not itself a basis for damages. See Distasio v. Perkin Elmer Corp., 157 F.3d 55, 62-63 (2d Cir. 1998). Cf. Cuddyer, 750 N.E.2d at 936-37 (harassment not timely reported to MCAD can be considered as evidence of hostile work environment even though not a basis for damages).

elaborate on this point, but the colloquy bogged down in a misunderstanding as to whether Gray was complaining about what Genlyte's counsel had said or claiming that the affirmative instructions by the court were mistaken. In any event, the judge gave no further instruction on this issue and, as already noted, Gray's counsel failed to object after the supplemental instruction with the precision needed to preserve the point.

The question remains whether the failure to correct the misstatement of Genlyte's counsel was plain error. The difficulty for Gray is that the district court's own instructions, including its reference to "totality of the circumstances," left the jury free to consider episodes that were not specifically reported.[6] Thus, it is virtually impossible to find that the district court's failure to correct a four-word qualifying phrase, used in a single sentence of defense counsel's lengthy closing argument, was likely to have altered the outcome of the case. This is alone enough under Olano to derail the claim of error.

Turning from jury instructions to rulings on evidence, Gray says that the district court erred in three instances by excluding relevant testimony. Not all rulings on evidence are reviewed solely for abuse of discretion; an evidence ruling could present a pure legal issue requiring us to construe a Federal Rule of Evidence. Olsen v. Correiro, 189 F.3d 52, 58

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[6]The district court did say that conduct that occurred before the company was on notice could not be included in calculating damages, but Gray makes no objection to this proposition which is addressed to causation. College-Town, 508 N.E.2d at 591-93; cf. Cuddyer, 750 N.E.2d at 936-37. In fact, Gray essentially requested this instruction in her original proposed jury instructions.

(1st Cir. 1999). But all three rulings here are judgment calls, balancing considerations of relevance and prejudice, where deference to the district court's on-the-spot judgment is substantial. Fitzgerald v. Expressway Sewerage Constr., Inc., 177 F.3d 71, 75 (1st Cir. 1999); Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987). We turn to those claims.

First, Gray claims that she should have been able to testify that in 1996, a co-worker told her that Hermenegildo had physically assaulted his wife so seriously that his wife had required emergency medical treatment. Gray's theory was that, true or false, this report greatly enhanced her own fear of Hermenegildo and explained why her emotional reactions to the later acts of alleged harassment were so severe. The district court did allow Gray to testify that she was told something by the coworker that greatly enhanced her fear of Hermenegildo, but the court forbad a reference to the physical assault as unduly prejudicial. Fed. R. Evid. 403.

The district court was perfectly entitled to be concerned that a specific reference to the report of an assault would be considered for its truth and would improperly prejudice the jury. The compromise reached by the district court was a perfect example of a reasonable call that is not an abuse of discretion. As it happens, Gray's counsel in closing argument did refer specifically to the physical assault, although the company's counsel objected and the judge—without telling the jury to disregard the remark— told Gray's counsel to move on in his closing argument.

Second, Gray claims that she should have been permitted to offer evidence of Hermenegildo's April 2000 misdemeanor conviction for "accosting" Gray. Massachusetts

law defines the offense to include the use of "offensive and disorderly acts or language [to] accost or annoy persons of the opposite sex . . . ." M.G.L. ch. 272 § 53. The act was the tongue gesture that Hermenegildo had made at Gray in September 1998, after Gray testified at her August 1998 worker's compensation hearing. Gray argued that she was entitled to offer the conviction to refute the company's position that Hermenegildo's behavior was no more than childish or adolescent behavior and was not sexual harassment.

The district court was well within its discretion to exclude the evidence of the fact of conviction. See Gil de Rebollo v. Miami Heat Ass'ns, Inc., 137 F.3d 56, 64 (1st Cir. 1998). The criminal conviction was certainly "relevant" in the sense that it reflected social judgment, both in the statute and the conviction, that Hermenegildo's conduct was criminally blameworthy, and this would rationally have some bearing on whether the conduct was also sufficiently serious to constitute severe harassment. The conviction would also have served to counter the "childishness" label offered by the defense.

Nevertheless, there is an obvious potential for confusion and unfair prejudice, Fed. R. Civ. P. 403, since the sexual harassment standard and the accosting statute involve two different tests and, taken literally, the accosting statute would embrace conduct so mild ("offensive and disorderly acts or language [,] accost[ing] or annoy[ing]" the victim) that it is easy to imagine violations of the statute that would not constitute serious harassment. Gil de Rebollo makes clear that judgments under Rule 403 are primarily the province of trial judges in particular, and that admission of evidence of this kind is likely to depend on a discretionary judgment. 137 F.3d at 64.

Third, Gray asserts that the district court erred in excluding the testimony of her co-worker, Ray Tisdale, concerning Hermenegildo's September 1998 conduct following Gray's worker's compensation hearing. He would have testified (1) that in response to Tisdale's testimony against Hermenegildo, the latter harassed Tisdale by making a punching motion with his fist and "giving him the finger"; (2) that he (Tisdale) filed a complaint and Hermenegildo in some degree admitted misbehavior; and (3) that despite these facts, the company did nothing about Tisdale's complaint. Gray argued that Hermenegildo's acts themselves intimidated her and that the company's failure to act reinforced her view that the environment in which she worked was unprotected.

Genlyte moved to bar evidence of the episode as bearing solely on Hermenegildo's propensity for violence and sexually offensive conduct—which is a rational but forbidden inference. See Fed. R. Evid. 404(a). Gray's most plausible counters—to show other uses of the evidence, see Fed. R. Evid. 404(b)—were that the company's failure to respond confirmed its indifference to complaints and that Hermenegildo's quasi-admissions to the company (e.g., that his alleged threatening gesture to Tisdale was only scratching his nose) were so incredible as to undermine the company's reasonable belief in any of Hermenegildo's denials.

At trial, the district court without further discussion excluded testimony from Tisdale but later allowed in a company memorandum, setting forth Tisdale's allegations and Hermenegildo's unpersuasive response, for the limited purpose of showing that the company had received this information. In closing, Gray's counsel relied on this episode and asserted as a matter of fact that the company had ignored the Tisdale

complaint and Hermenegildo's response to it. Thus, despite the court's rulings, Gray got in the gist of the evidence.

Even if the evidence had been excluded in full, we would not reverse the district judge. It was principally, and powerfully, relevant as propensity evidence—which was the forbidden use. But, involving conduct directed at a different party, it was only of limited relevance as to whether the company failed to respond to Gray's complaints or unduly credited other denials by Hermenegildo. Given its limited relevance and the potential for misuse as propensity evidence, exclusion was a call within the district court's discretion. United States v. Gonsalves, 668 F.2d 73, 75 (1st Cir. 1982).

This exhausts Gray's claims of error, but something more must be said. If Gray's version of events were taken at face value, it would be hard to understand the jury's finding that severe sexual harassment had not been proved. The jury was entitled to discount Gray's testimony; credibility is preeminently a jury matter and Gray's credibility was attacked. Yet, on a cold (and incompletely transcribed) record, we still think the outcome on question (3) surprising, even allowing for what seems to have been a skillful defense.

Genlyte may have no further legal obligation to Gray, but it ought carefully to ponder its moral obligation to assist her recovery and reemployment. Even if various of Hermenegildo's acts were unknown to the company or some did not occur at all, Gray was manifestly mistreated by Hermenegildo on the job and suffered badly as a result. If an employer's sense of humanity is limited to what the law demands, it will find to its regret that the law will demand more and more.

The judgment is affirmed. Each side shall bear its own costs on this appeal.

It is so ordered.

ATTACHMENT - SUPPLEMENTAL INSTRUCTION

Members of the jury, you left me yesterday with a question, as follows:

"We are not" — "We're not going to reach a verdict tonight, as we are 'hung up' on Question 3. I would not characterize us as deadlocked, but we do need some more time to deliberate.

"The wording of Question 3 has us a bit concerned. 'Sufficiently severe' is fairly nebulous, and we are wondering if we could have some clarification.

"Thank you very much."

Well, you're right, it is nebulous. And here is what I hope will clarify the situation for you.

The question, Question 3 really boils down to this:

Would the mythical reasonable woman that we talked about yesterday, that I described to you yesterday, neither overly sensitive nor overly hardened, would that mythical reasonable woman find the work environment at Lightolier, as it has been described to you in the course of the trial, hostile, humiliating, or intimidating as a result of the sexual harassment that you found had occurred?

You have now found it occurred, because you have clearly answered yes to Questions 1 and 2.

So, it boils down to that: Would a reasonable woman find the work environment hostile, intimidating, or humiliating, as a result of the sexual harassment conduct that had occurred?

Now, in making that judgment, consider the totality of the circumstances over the period of time in question, that is, '95, '7 and '8, including the frequency of the conduct, its severity and/or offensiveness, whether it is physically threatening, whether it would unreasonably interfere with a reasonable woman's job performance, or whether it would undermine her ability to succeed at her job.

Now, note that frequency and severity sort of go together, that is, fewer truly gross incidents may be sufficient, as may be a whole string more less [sic] offensive ones. In the end, it is your judgment in balancing the totality of what occurred.

United States Court of Appeals
For the First Circuit

LINDA GRAY,
Plaintiff, Appellant,

v.

GENLYTE GROUP, INC.,
Defendant, Appellee.

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch, Lipez, Howard, Circuit Judges,
and Gertner,[7] U.S. District Judge.

ORDER OF COURT
Entered: June 17, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular service and a majority of said judges not having voted to order that the appealk be heard or reheard by the Court en banc, it is ordered that the petition for rehearing and the suggestion for a rehearing be denied.

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[7]Of the District of Massachusetts, sitting by designation.

By the Court:
Richard Cushing Donovan, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

A separate opinion concurring in the order denying petition for rehearing is attached.

[cc: Mr. Stern, Ms. Hagan, Mr. Van Dyck, Ms. Pitt & Mr. Lamkin.]

GERTNER, District Judge (concurring in the order). I concur in denying the Petition for Rehearing.

The appellant, Linda Gray ("Gray"), sued Genlyte Group ("Genlyte") for sexual harassment. The jury found for Genlyte and Gray appealed. This Court affirmed. A petition for rehearing, with the suggestion of a rehearing en banc, was filed. It was denied by the Court en banc, and by the panel. I concur— but reluctantly— for the reasons described below.

The rehearing petition was directed to a central finding of the panel's decision — that plaintiff's counsel had not properly objected to the court's supplemental instructions under Fed. R. Civ. P. 51. Rule 51 requires that any objection to instructions state "distinctly the matter objected to and the grounds of the objection."

In this Circuit the rule has been strictly construed: "'Objection' means to the instruction as given; thus, even if the initial request is made in detail, the party who seeks but did not get the instruction must object again after the instructions are given but before the jury retires for deliberations." Gray v.

Genlyte Group, Inc., 289 F.3d 128, 134 (lst Cir. 2002) (citing Smith v. Mass. Inst. Tech., 877 F.2d 1106, 1109 (lst Cir. 1989}}. Plaintiff's counsel here did not object with the specificity required by this Court after the supplemental instruction was given. While he submitted written proposed instructions to answer the jury's questions, and reiterated his concerns about the court's proposed instructions before the trial court delivered them, after the instructions were given, when asked if he had any objections, Gray's counsel responded, "Just simply the ones I have already stated, Your Honor." Gray, 289 F.3d at 133. This was not sufficient.

As a result, the standard of review was "plain error," rather than the usual appellate standard. Although this Court found that there were flaws in the supplemental instruction, Gray's appeal failed because the flaws did not meet the more stringent standard.

The Court en banc has made it clear that it does not wish to reconsider its position with respect to Rule 51, and, given that position, denial of Gray's petition is inevitable. While I reluctantly concur, I would urge the court to reevaluate that position.

On rehearing, Petitioner focuses on this Circuit's interpretation of Rule 51, which the panel decision acknowledged "may seem harsh," 2002 WL 553572, and, in this case, was dispositive. To the Court sitting en banc, Petitioner urged that the Court reconsider its position on Rule 51 objections, noting that "every other Circuit recognizes an exception to the general rule that objections must be stated after the charge is given, where restating objections after a jury charge would be a mere formality and unavailing." Petitioner's Brief at 8. To the panel, Petitioner noted that even if the

Circuit's policy were to remain unchanged, the Court has recognized an exception in Wilson v. Mar. Overseas Corp., 150 F.3d 1 (lst Cir. 1998), into which this case can fit. In Wilson, the Court found that an objection made prior to the jury charge may be preserved where "it is shown that the district court had actual notice of the nature and grounds of the objections." 150 F.3d at 9.

The Second through the Eleventh and District of Columbia Circuits—to varying degrees—recognize that objections do not have to be restated where, as here, restating such objections after the charge would be a mere formality. Thornley v. Penton Publishing Co., 104 F.3d 26, 30 (2d Cir. 1997); Smith v. Borough of Nilkinsburg, 147 F.3d 272, 277 (3d Cir. 1998); Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 866 n.1 (4th Cir. 1999); City of Richmond v. Madison Mgmnt. Group, Inc., 918 F.2d 438, 453 (4th Cir. 1990); Russel v. Plano Bank and Trust, 130 F.3d 715, 720 (5th Cir. 1997), Preferred RX, Inc. v. American Prescription Plan, Inc., 46 F.3d 535, 547 (6th Cir. 1995); Lawson v. Trowbridge, 153 F.3d 368, 372 (7th Cir. 1998); Brown v. Sandals Resorts Int'l, 284 F.3d 949, 953 n.6 (8th Cir. 2002); Gulliford v. Pierce County, 136 F.3d 1345, 1348 (9th Cir. 1998); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1262 n.5 (l0th Cir. 1998); Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1329 {llth Cir. 1999); Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686, 693 (D.C. Cir. 1987); see also Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 27 (1962) (objections preserved where, although petitioners acquiesced in additional instructions after general charge, counsel and trial court held conferences prior to charge to discuss instructions at which counsel objected to instructions and requested other instructions, court had consistently ruled adversely to counsel

on point at issue, and after court delivered charge it told counsel that prior objections would be preserved).

For example, the Ninth Circuit has held that an objection to a jury instruction is a pointless formality, not required to preserve the issue for appeal, when 1) throughout the trial the party argued the disputed matter with the court, 2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and 3) the party offered an alternative instruction. Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 714-15 (9th Cir. 2001).

In contrast, the First Circuit's rule is so rigorous that it has permitted few exceptions to it. See Harrington v. United States, 504 F.2d 1306, 1316-17 (lst Cir. 1974) (objections were preserved by brief post-charge statement on the record, where parties had discussed the requested instructions with the judge at length but off the record). The Court cautioned that even in a situation like Harrington—objections following an off-the-record charge conference —"[we] warn parties that there is a heavy burden upon them in such event to show that [objections were] done with sufficient specificity and distinctness, and we caution district courts to be slow in tolerating such procedure." Wilson, 150 F.3d at 7 (citing Dunn v. St. Louis-San Francisco Ry. Co., 370 F.2d 681, 685 (10th Cir. 1966)).

In Wilson, which petitioner emphasizes, counsel objected to the district court's failure to give an instruction on contributory negligence. Long before the jury was charged, the trial judge had made it clear that he did not believe that there was enough evidence to require an instruction on contributory negligence. Nevertheless, the defendant provided the court with instructions on the subject. After closing argument, when counsel sought to raise the issue again, the judge noted: "You

listen to my instructions. I am sure you won't like them, but you can save your rights after I am through." Id. at 9. Following the final charge, the defendant's counsel generally renewed his objection to the instructions, but did so in a fashion that the court found "might well be insufficient to satisfy Rule 51." Nevertheless, in the context of the case, the First Circuit found that the trial court was "well aware of the grounds for the defendants' objections to the lack of instructions on comparative negligence," 150 F.3d at 8, and, indeed, discouraged counsel from rehashing the objections. 150 F.3d at 9.

The petitioner would extrapolate from the language in Wilson to create a broad exception to Rule 51—namely, when the context makes it clear that the court was sufficiently apprized of counsel's objection. But that approach would effectively transform the Wilson "exception" into the rule of other circuits. Whereas other courts will always look to the context to determine if the trial court was in fact aware of the grounds for the objections, and determine whether restatement was necessary, this court requires that specific words be spoken after the charge.[8]

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[8] Two aspects of Wilson suggest that the Court did not intend an exception of the breadth suggested by Gray's counsel: In Wilson, the content of the contributory negligence charge was not at issue. The only question was whether there should be such a charge at all, in effect, a "yes" or "no" vote. There were no complex questions 0£ phrasing or nuance. Moreover, the court's position —both on the merits and its unwillingness to hear further argument —was clear. Nevertheless, the First Circuit characterized Wilson as a "close" case.

The determination of the Circuit sitting en banc plainly drives the outcome of this petition for rehearing. I write only to urge the court to take a look at this policy again, particularly given the experience of other circuits.

Rule 51 was intended to redress a very practical problem: giving the judge information quickly and concisely, before the jury retires to deliberate, so that she can correct any errors in the charge. It should be enforced with a view to the same practicalities. In this case, counsel's omission—especially given his zealous efforts just before the charge, addressed to the judge's proposed instructions—should not raise the bar for the consideration of substantial appellate issues.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA 99-12114-RWZ ZOBEL, D.J.

LINDA GRAY

v.

GENLYTE GROUP, INC.

Eleventh Day of Trial

Jury Deliberations - Verdict

APPEARANCES:

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Courtroom 12
Federal Courthouse
Boston, Massachusetts

March 22, 2001

Computer-Aided Transcription

THE COURT: Before I consider your submissions, let me ask you —

MR. STERN: Is there a submission from the other side?

MR. LAMKIN: Yes. I just gave it to you.

MR. STERN: Sorry.

THE COURT: Let me ask you this, the formulation, as is so often true, is , really, it comes from the appellate cases that don't think about how you explain something to the jury. They just want to be legally correct, and we follow it because we don't want to get reversed. However, when you look at it, what this question really asks without anything else is whether a reasonable person put into this place where Ms. Gray was, experiencing what Ms. Gray experienced, would find the work environment to be hostile, intimidating, humiliating, as a result.

That's it. We don't need the all pervasive stuff or anything like that, right, at least in the initial formulation?

MR. STERN: I heard that in the form of a question?

THE COURT: It is a question, except I keep elaborating.

MR. STERN: Your honor, I believe there's a very important word missing in what you just said, is the word "or," which is in all of the appellate formulations. But I do agree with you that the appellate —

THE COURT: "Or" what?

MR. STERN: Hostile, intimidating, then about "or."

THE COURT: Okay.

MR. STERN: Okay.

THE COURT: I mean, I was simply trying to get around the pervasive part

MR. STERN: Yes.

THE COURT: At least initially.

MR. STERN: I do agree with you, your Honor, that the problem with the appellate and then decisions is they just keep repeating the same words over and over and over again. So, what I've created for you, if will look in my Alternative Request No. 2, is the trial and administrative agency formulations of the same question, which do bring it down-to-earth and give several different explanations of what the terms mean. In fact, one of them is an appellate, which is: Would it

create a barrier to a reasonable woman's full and untrammelled participation in the workplace? That is both federal and state.

THE COURT: Yes, I can just see what this jury is going to do with that. We got to speak English.

MR. STERN: Well, your Honor, the rest do speak English, "undermines her ability to succeed in her job."

THE COURT: Okay. Let me just go back a minute. It seems to me that an answer to the jury should be in two parts. One of them is simply the definition, simply the question they have to answer. And I think the question they have to answer is: Whether a reasonable woman in this— sitting at Lightolier, would find the work environment to have become hostile, intimidating, or humiliating, or whatever, as a result of the acts of sexual harassment. And then— that's part one. And then part two is trying to elaborate a little bit about that: What is that it makes it a hostile work environment? It is conduct that undermines her ability to succeed; it is conduct that, that would make a reasonable woman feel anxious and fearful, or whatever. I mean, we can come to that.

Does that make sense, though, so that the original formulation says nothing at all about pervasive or whatever? It simply puts the reasonable woman into the place.

MR. LAMKIN: I think, I understand your Honor's concerns, and it's sort of difficult because almost anything you say tends to become almost circular. But I think what what we propose is sort of in two parts. I apologize for the handwriting. But essentially part one says, because I think the jury's question was just those two words, "sufficiently severe," was that they were really concerned about.

THE COURT: Here is the question. I didn't show it to you yesterday. I just read it to you.

MR. VAN DYCK: Your Honor, I apologize for being late.

THE COURT: I know. It takes longer to swim to work than it does to walk.

MR. LAMKIN: As I read this, I mean to some extent they're hung up on one thing, "sufficiently severe," those two words.

THE COURT: You know, sufficiently severe, or I've forgotten what else the question said, pervasive, I think.

MR. LAMKIN: They said: The wording of Question 3 has us a bit concerned, "sufficiently severe."

THE COURT: "And/or pervasive" is the other piece of it.

MR. LAMKIN: Right, but that's not what they said in the note.

THE COURT: You know, we can't be so literal about this.

MR. LAMKIN: Well, I think where I'm heading is that we really shouldn't be. Because I think what we need to tell the jury is that if they're being literal about it that they really shouldn't focus on just these two words or any two words in the definition, that they really need to look at the whole thing.

THE COURT: Yes, but what is wrong with my formulation if it is then followed, by looking at whole thing, by defining it in terms of difficulty of succeeding...

MR. LAMKIN: Well, I guess the difficulty— I mean, I have not obviously had a chance to go through the plaintiff's submission in any detail. But I'm just afraid that if we go through a series of various formulations that are not from appellate courts, that we're going to either have to give them such a long list to make sure that they're all in agreement, that it's going to be useless.

THE COURT: What I had told them before was that they need to consider the totality of the circumstances over the period of time in question, including the frequency of conduct, its severity and offensiveness, whether it is physically threatening, whether it would unreasonably interfere with an employee's job performance. And I would say that again, but I would start it not by saying is it so severe, but would a reasonable person find it intimidating.

MR. LAMKIN: I think if we start out by saying "would a reasonable person find .it intimidating, hostile," whatever else it is, and then basically repeat or maybe slightly elaborate on what your Honor already said, I think that makes sense. And I think, frankly, the language in our proposed Jury Instruction 4, which is what was submitted with a few things scratched out, pretty much does that. I'm not sure that it says anything different; but it basically goes through, you know, if it's, if it's less severe, I guess is a little bit circular.

THE COURT: I want to try to use different words, frankly. I want to take instances of conduct rather than quality of conduct, as much as possible.

MR. LAMKIN: I mean, I certainly see the value of that. I'm just afraid; and, obviously from our perspective, you know, we would want to say, relying on the cases that we cited in our motion for judgment papers, as well, you know, staring at somebody repeatedly is less severe and physically assaulting somebody would be more severe. I doubt very much that the plaintiff would care for that formulation. And I'm just afraid —and, similarly, you know, they would propose something with examples that we probably wouldn't care for. I'm just afraid we're going to go back and forth trying to come up with examples. And at the end of the day, there either won't be any that we can agree on or there will be so many that it won't really be helpful to the jury.

THE COURT: Well, tell me, does my formulation satisfy you as I've outlined it?

MR. LAMKIN: But for the problem of coming up with specific examples, I think it does.

MR. STERN: The first, the way you formulated it in first instance was appropriate, your Honor. But I do think that there are not examples because we can go on into twenty million of those. But it is a state law case, and these are state administrative agencies' different ways of saying what they consider to be the issue. And I think the different ways of saying it, as opposed to examples, is necessary.

If I could say two other things, your Honor, maybe three other things, briefly, I would appreciate it; they are in my motion, but. Given their position on this matter that they are not disputing that the conduct occurred, I think, you know, it's virtually appropriate to direct on this question, especially since

—but I certainly think it's necessary to correct two things that the jury has heard and that haven't been corrected.

The jury heard me make a misstatement of the law and heard you correct it. They heard the defendant's counsel make a gross misstatement of the law on this very question, and they have not heard you say that that was incorrect.

THE COURT: What did she say that —

MR. STERN: She said that the only conduct that could consider on the reasonable person standard was that which was timely and adequately noticed to the company. And you repeated in your instruction, your Honor, twice, timely and adequately noticed. And I requested at the side bar that you tell them that her instructions to that effect was totally, was totally wrong; it was completely inaccurate. And you had corrected my misstatement of the law, and I asked to you correct her misstatement of the law, and it hasn't been done yes.

THE COURT: Are you suggesting that the jury can consider the 1981 conduct in determining whether a reasonable person would in 1995?

MR. STERN: No, your Honor,.

THE COURT: Well, then, I don't understand what you're saying.

MR. STERN: What I'm saying is this, I'll try to go slower and more calmly, may be the problem.

Ms. Pitt said in her closing that in respect to the reasonable woman standard, the jury could only consider the

conduct that she timely and adequately notified the company of; that is to say, that every thing that happened to her that she may have left out of one description and told them two weeks later could not be considered. The law is very, very clear that that is a separate question, timely and adequately noticed.

THE COURT: I said nothing of the sort. My instruction said nothing that she required a timely —

MR. STERN: Yes, you did, your Honor. I'm afraid that you did at the end of your instruction say precisely those words.

THE COURT: At the end of the instructions I wasn't talking about this piece of it. I was talking about damages.

MR. STERN: You said she cannot recover for harassment she did not adequately and promptly report.

THE COURT: That's not this issue.

MR. STERN: I understand it's not this issue. But if I may I be heard as to why I think jury is hung up on this question? I mean, I really think that this question is one that virtually could be directed upon.

THE COURT: No, that's absolutely not the case.

MR. STERN: Okay. But I think the jury is hung up on this question, your Honor, because they were told during closing argument that they could not consider conduct that she didn't timely and adequately report. They were never told that was a misstatement— they could not consider that on a reasonable woman standard. They were never told that that was a statement of the law. And the phrase "timely and adequately

report," even though in another context, was in fact repeated for them. So that I believe that the jury is sitting there thinking is that they can't consider how she felt when he grabbed his crotch and said, "Do you want this? "or, "You 're not getting it any more," because it's not documented that she reported that at a particular time, you know, three or four — she didn't wait three or four months to report that.

Now, since the defendant has not even contested that that conduct occurred, it- seems to me it is very important for the jury to understand that what they were told in closing argument by Ms. Pitt is, as I said in my closing argument, is not accurate. They must have the impression, I believe, your Honor, from your having corrected what I said was wrong in the law and explicitly told them that Mr. Stern made a mistake and not having told them Ms. Pitt made a mistake also, that they are going by a standard that not only— that is directly contrary to the legal standard. The legal standard is the totality of all conduct that occurred, not the totality of all conduct that was reported. It's—

THE COURT: In the first place, Mr. Stern, it is incorrect that I did not correct Ms. Pitt. I corrected her on two items. I corrected her on giving a message and I corrected her on her belief that the jury could not take into account her beliefs. I was careful, very careful, to correct both counsel as to matters that I regarded in error.

MR. STERN: I didn't mean it that way.

THE COURT: Now, without lecturing any more about what I did wrong in this regard, I am looking for assistance. And the question is: Whether the formulation that I made, that I just outlined to you, will— is all right from your perspective?

Because the jury is here, I want to instruct them, I don't want to keep them waiting.

MR. STERN: It is all right as long as the other statement— misstatement of law is corrected along with it, your Honor. And as long as the jury is told what the law was as of January 1st, 1997, which was that an employer had an obligation to promote a sexually free— I'll quote it , your Honor, "an employer has an obligation to promote a workplace free of sexual harassment." They have never been told that. That is the law as of January 1, 1997, before either of these injuries occurred, and it has never been told to them. And I think it is important context, a very important context, for them to be considering all of these questions, this question included.

I do not mean any disrespect toward the court. I am very, very sorry if I said it in such a way as to indicate any disrespect. I just do think that the misstatement that they have been given by Ms. Pitt needs to be explicitly corrected; and, obviously, it is not too late at this point in time to do that.

MR. LAMKIN: Which assumes that there was a misstatement, which I frankly don't see.

THE COURT: Can I have the question back, please.

Lisa, are the jurors all here?

THE CLERK: No.

THE COURT: How many are missing?

THE CLERK: Three, two from the Cape. I just checked.

We're still on at 9:30 for Ryan?

THE CLERK: Yes.

THE COURT: And Davenport not until 10?

THE CLERK: No, I asked them to come at 9:30. I just went this morning, I ordered snacks again for 10:30.

THE COURT: Okay.

MR. STERN: Your Honor, may I have one more sentence, please?

I do very respectfully apologize if the messenger or way the message is being delivered is in any sense disrespectful, but I hope the message is not lost for how it was delivered are who is delivering it. The message— thank you.

THE COURT: Mr. Stern, I have nothing against you, I except for the fact that you keep trying to take over my job. I've been trying to deal with it with humor, rather than jumping on you.

MR. STERN: And you have.

THE COURT: And trying not to do it in front of the jury.

MR. STERN: And it is appreciated, your Honor, very much.

THE COURT: I'm writing it out for myself, simply because we are so hung up on the precise wording.

(Pause.)

Mr. Lamkin, read for me the handwriting on your No. 4

MR. LAMKIN: It says: "You should not be focusing solely on the language 'sufficiently severe'; rather, look at Question No.3 in its totality. with that being said, here is an instruction which should give you some guidance."

THE COURT: Now, here's what I propose to say, which is, you know, in most respects exactly what I said before, except I'm reformulating a little bit. I will tell the jury that Question 3, that I understand the problem they have with these vague phrases, Question 3 boils down to this:

Would the magic— the mythical reasonable woman that I described to you yesterday find the work environment at Lightolier hostile, humiliating, or intimidating as a result of the sexual harassment that you found had occurred. Because by now they have found that it did occur. In making that judgment, consider the totality of the circumstances over the period of time in question, which is in fact what I told them yesterday, including the frequency of the conduct, its severity and/or offensiveness, whether it is physically threatening, whether it would unreasonably interfere with a reasonable woman's job performance or whether it would undermine her ability to succeed at her job.

The other pieces that you have given me, Mr. — that's where I would stop. The other pieces are just recasting of the same thing. So, I don't want to just say the same thing in different words over and over again. I'm trying to be as concise and as focused as I think I can be. And I think what I have here includes everything that you have in 2(a), 1 through 8, other

than going beyond typical workplace horse play, which somehow doesn't seem to me to be very helpful.

MR. ANDERSON: If you look at —your Honor, can I take over this for Mr. Stern at this point?

THE COURT: What are you trying to do? Keep him, muzzled?

MR. STERN: Keeping him muzzled? You can't do it. I can't do it.

THE COURT: You seem to be succeeding.

MR. ANDERSON: 2(e).

THE COURT: I'm sorry?

MR. ANDERSON: 2(e).

THE COURT: Where are you reading? I have 2(a) and then a number.

MR. ANDERSON: 1 through 8.

THE COURT: Right.

MR. ANDERSON: And 2(b), (c), (d), (e) following.

THE COURT: Oh, I didn't realize there was more.

(Pause.)

Okay.

MR. ANDERSON: And just to the extent that you haven't given things that we requested, we would request that you do give those things. You know, whether we can reformulate "full and untrammelled"? It's a barrier to her working in the workplace.

THE COURT: "It unreasonably interferes with her job performance or would undermine her ability to succeed at her job." I mean, when you add a barrier it is the same thing. You know, the more we add nuance things, the more confusing it gets. I need to have that formulation which is most focused and least confusing.

MR. ANDERSON: The other thing, the very first —

THE COURT: I think that (e) is probably appropriate to put in. It has to do with a number of occasions. I think that even a single occurrence is sufficient if of true offensiveness, you know, a real offensiveness or a major offensiveness.

MR. LAMKIN: The only thing I would say about (e), I certainly have no problem saying there doesn't need to be any particular number of them. Under the circumstances of this case, I'm a little uncomfortable with saying even one can do it, because I really do think as a matter of law the kinds of things that she's talking about in this case, just one of those by themselves wouldn't do it, as matter of law. So, I have no problem saying, you know, you don't have —it can be, you know, however many occurrences you think is appropriate, it can be; but I would be hesi tant to say only one can do i t .

MR. ANDERSON: But, your Honor, you know, to go back and forth, a series mounting over time, a single incident in

that series can, can create a hostile environment which without the series might not in and of itself.

MR. LAMKIN: Except that I think by the rest of the instruction, the jury is already aware that they can consider a series.

THE COURT: I would add this: "Note that the frequency and severity may go together. Fewer truly gross incidents may be sufficient, as may be a string of lesser offensive ones. It is your judgment in balancing the totality."

MR. LAMKIN: That sounds fine to me, your Honor.

MR. ANDERSON: Your Honor, our position is that, for the record, that we would like you to give each of the examples, including full and untrammelled, a loss of self-esteem, embarrassment, angry or agitated, humiliating, that would cause her feel anxious or fearful, and that those be placed in the alternative, any of those effects is sufficient. The other thing, the first formulation that you suggested was a reasonable person in Ms. Gray's position having Buffered what she suffered.

THE COURT: No, no, if I do that, I didn't say that, didn't say suffer what she suffered.

MR .ANDERSON: Okay.

THE COURT: Because that, that would absolutely confuse the reasonable person; it would be subjective.

MR. ANDERSON: Okay. So, you did say having experienced what she testified to? Or, you said something to that effect.

THE COURT: I said the work environment at Lightolier. I don't —

Lisa, can you find out if any more have come, please.

I will not give the totality of everyone of your listings here, because I do not think that it will help the jury. I think it will be more confusing than helping. And I really am trying to do it in such a way that the jury can find some assistance from this additional instruction, not to satisfy the court of appeals or counsel, for that matter.

MR. ANDERSON: Just on that, you did the first time say, you were focused on the events as Ms. Gray described them. And now you're on a more abstract general work atmosphere. And I think —

THE COURT: At Lightolier.

MR. ANDERSON: At Lightolier. And I think that the issue is really the evidence they have as to what Ms. Gray testified, which is not really contested, whether that evidence experienced by a reasonable woman would cause a hostile atmosphere.

THE COURT: Well, that's true, I did say that; however, I think I was wrong.

MR. LAMKIN: For the record, your Honor, I think you were right.

THE COURT: No, I was wrong the first time. I think that putting Ms. Gray into Question 3 is bound to confuse the jury.

MR. LAMKIN: That's true.

MR. ANDERSON: Your Honor, I just think there's an additional confusion as to whether somebody else in the work environment that might not have experienced what Ms. Gray experienced would find that hostile, and that is not the issue.

THE COURT: The work at Lightolier as it has been described.

Off the record.

[Discussion off the record.]

MR. STERN: While we have a moment, on the other point, I would just like to read from College Town: "We are not presented with a question of whether General Law 151B, section 4, imposes an affirmative obligation on the employer to insure its workplace is not pervaded by harassment."

That was the state of law in 1986 —1987. That question had not been addressed by the court. The Legislature addressed it. And that is why it is different in 1997. And the jury is still unaware of that fact that there is that obligation, and I don't think any of the instructions have covered that.

[Whereupon, the jury entered the courtroom.]

THE COURT: Good morning.

Please be seated.

You don't look at all drowned.

Members of the jury, you left me yesterday with a question, as follows:

"We are not" —"We're not going to reach a verdict tonight, as we are 'hung up' on Question 3. I would not characterize us as deadlocked, but we do need some more time to deliberate.

"The wording of Question 3 has us a bit concerned. 'Sufficiently severe' is fairly nebulous, and we are wondering if we could have some clarification.

"Thank you very much."

Well, you're right, it is nebulous. And here is what I hope will clarify the situation for you.

The question, Question 3 really boils down to this:

Would the mythical reasonable woman that we talked about yesterday, that I described to you yesterday, neither overly sensitive nor overly hardened, would that mythical reasonable woman find the work environment at Lightolier, as it has been described to you in the course of the trial, hostile, humiliating, or intimidating as a result of the sexual harassment that you found had occurred?

You have now found it occurred, because you have clearly answered yes to Questions 1 and 2.

So, it boils down to that: Would a reasonable woman find the work environment hostile, intimidating, or humiliating, as a result of the sexual harassment conduct that had occurred?

Now, in making that judgment, consider the totality of the circumstances over the period of time in question, that is, '95, '7 and '8, including the frequency of the conduct, its

severity and/or offensiveness, whether it is physically threatening, whether it would unreasonably interfere with a reasonable woman's job performance, or whether it would undermine her ability to succeed at her job.

Now, note that frequency and severity sort of go together, that is, fewer truly gross incidents may be sufficient, as may be a whole string more less offensive ones. In the end, it is your judgment in balancing the totality of what occurred.

Does that help you?

In that case, I charge —

Well, first, any objections?

MR. LAMKIN: No, your Honor.

MR. STERN: Just simply the ones I've I already stated, your Honor.

THE COURT: In that case, I now charge you to continue your deliberations, and let us know again if you have any further questions or when you have a verdict. The goodies are coming at 10:30. And if you don't have a verdict by lunch, lunch at noon, 12:30; is that okay?

A JUROR: That sounds great.

THE COURT: Thank you.

[Whereupon, the jury retired to recommence its deliberations at 9:29 a.m.]